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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL D. BERRIGAN,

Defendant and Appellant.

F067985

(Super. Ct. No. BF146979A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Sandra Waite for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Franson, J.

INTRODUCTION

Defendant was charged with one count of transportation of methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a)) and one count of possession of methamphetamine for sale (Health & Saf. Code, § 11378). At his preliminary hearing, defendant made a motion to suppress the methamphetamine and digital scale that officers had found in a zipped pouch inside defendant's automobile, but the motion was denied on the grounds that defendant's detainment was lawful and the automobile search was consensual. After his arraignment, defendant renewed his motion to suppress, and the motion was again denied. Defendant subsequently pled no contest to both counts and was placed on three years felony probation with 120 days of work release and community service.

On appeal, defendant argues: (1) he was unlawfully detained prior to the search of his automobile, (2) he did not freely consent to the search of his automobile, (3) the search of a zipped pouch within defendant's automobile exceeded the lawful scope of the search, and (4) his trial counsel was ineffective for failing to argue that the search of the zipped pouch exceeded the lawful scope of the search. We affirm.

FACTS

On February 12, 2013, officers arrested defendant's son, Ruston Berrigan, at the Lone Oak Lounge in Bakersfield, California. As they were doing so, defendant confronted the officers about the reason for Ruston's arrest, and was described by the officers at the scene as "extremely upset," "belligerent," and maintaining "a combative stance." Officers were able to persuade defendant to go back inside the lounge, at which point they transported Ruston to his home to conduct a consensual search of his property.

As the officers were conducting the search, defendant pulled up in his automobile and confronted the officer in the front yard. According to the officer, defendant was once again extremely agitated and in a combative posture, so much so that the officer placed a hand on his baton because he was certain he would need to use it. As the officer

attempted to speak with defendant, defendant returned to his automobile, opened the door, and reached half of his body inside the automobile. Believing defendant to be going for a weapon, the officer unholstered his weapon and ordered defendant to step away from the automobile.

Though defendant removed his body from the automobile, he refused repeated requests to move away from the automobile, and did not move away until additional officers arrived at the scene. Once he was away from the automobile, defendant consented to a pat down search, which yielded no weapons. Defendant also consented to a search of his automobile for weapons, and during that search officers opened a zipped pouch on the floorboard that contained a digital scale and three baggies of methamphetamine.

DISCUSSION

I. Defendant was not Unlawfully Detained.

First, defendant argues that the search of his automobile was invalid, as it stemmed from an unlawful detention. We disagree.

When an officer holds a justifiable belief that an individual “is armed and presently dangerous to the officer or to others,” the officer may “take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” (*Terry v. Ohio* (1968) 392 U.S. 1, 24.)

Here, defendant leaned into his automobile to retrieve an unknown object while engaging in a heated confrontation with a law enforcement officer. Under those circumstances, it was eminently reasonable for the officer to believe defendant was armed and posed a present danger to the officer’s safety and, indeed, the officer testified that he believed as much. Accordingly, the officer was justified in temporarily detaining defendant to neutralize any threat of physical harm, and defendant’s claim that the detention was unlawful is without merit.

We also disagree with defendant's assertion that his detention was unduly prolonged. When determining whether a detention is unduly prolonged, we "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." (*United States v. Sharpe* (1985) 470 U.S. 675, 686.)

In this case, according to officer testimony, defendant was detained for approximately 10 to 12 minutes while he was patted down for weapons and officers conducted a consensual search of defendant's automobile. Though defendant disputes that figure – instead claiming a detention period of 17 to 24 minutes – the facts of the case do nothing to suggest the police did anything other than diligently pursue actions that would either confirm or dispel their suspicions that defendant was armed and dangerous. Therefore, we cannot conclude that defendant's detention was unduly prolonged.¹

II. Defendant Freely Consented to the Search of his Automobile.

Next, defendant contends the search of his automobile was not consensual, as any consent was not freely given.² Again, we disagree.

While police are free to conduct a warrantless search when a defendant consents to the search, the People bear the burden of proving "that the defendant's manifestation of

¹ Defendant's claim that his detention was not justified under *Michigan v. Summers* (1981) 452 U.S. 692, is irrelevant. While *Summers* deals with the general detention of bystanders at the scene of a search, the detention in this case was justified under principles of officer safety.

² In addition to claiming his consent was coerced, defendant also denies ever giving consent in the first place. Defendant made the same argument before the magistrate, but his account was not accepted over the claims of consent made by the testifying officers. As we must accept the lower court's resolution of disputed facts and assessments of credibility, defendant's assertion must be rejected. (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

consent was the product of his free will and not a mere submission to an express or implied assertion of authority.” (*People v. James* (1977) 19 Cal.3d 99, 106.)

Here, the People presented testimony showing that defendant consented to the search of his automobile for weapons, was not handcuffed or held at gunpoint, and that the confrontation between defendant and the officers had calmed down by the time defendant gave his consent to the search. In fact, while the People presented testimony establishing consent, there was no evidence presented at all to support the proposition that defendant’s consent was anything other than voluntary.

Indeed, defendant’s argument amounts to a request that this court find his consent to be invalid solely because defendant was being detained at the time consent was given. Such a holding would be neither practical, nor reasonable, and must be rejected.

III. The Contents of the Zipped Pouch were not Beyond the Scope of the Search.

Next, defendant asserts that the contents of the zipped pouch were beyond the scope of the officers’ search for weapons.³ We disagree.

When executing a search, the scope of the search is “defined by the object of the search and the places in which there is probable cause to believe that it may be found.” (*United States v. Ross* (1982) 456 U.S. 798, 824.) Accordingly, an otherwise lawful search becomes unlawful if the executors of the search expand it to include areas and objects that cannot contain the object of the search. (*Ibid.*)

Here, defendant claims the contents of the zipped pouch exceeded the scope of the consensual search for weapons. However, the officer who discovered the pouch on the floorboard testified it was large enough to hold a weapon. Further, defendant’s assertions that the officers could have merely felt the outside of the pouch to determine if a weapon

³ Defendant did not raise this issue before the magistrate or the trial court but, as an analysis of the merits is essential to resolving defendant’s ineffective assistance of counsel’s claim, we decline to consider whether or not this issue is properly before this court.

was inside are misplaced, as the record shows the pouch contained a digital scale – a hard object that could represent either a weapon or the case for a weapon. As the officers were searching for a weapon defendant may have been reaching for inside his automobile, the contents of a zipped pouch that was large enough to conceal a weapon and did indeed contain a hard object was well within the scope of the officer's search. Defendant's argument must fail.

IV. Defendant was not Denied the Effective Assistance of Counsel.

Lastly, defendant argues his trial counsel was ineffective for failing to argue that the search of the zipped pouch within defendant's automobile exceeded the lawful scope of the search. We disagree.

In order to prevail on a claim of ineffective assistance of counsel a defendant must establish (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that a determination more favorable to defendant would have resulted but for counsel's unprofessional errors. (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) Here, however, we have already rejected defendant's assertion that the contents of the pouch were beyond the scope of the search as meritless. Accordingly, as defendant is not prejudiced by counsel's failure to raise meritless arguments, defendant cannot establish that his counsel's failure to raise the argument in question was unreasonable, nor can defendant establish that the result of his motion would have been different had his counsel advanced the argument. We affirm.

DISPOSITION

The judgment is affirmed.